IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No 270 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE C.K.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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GAFARBHAI ISABHAI KALVATAR

Versus

J D JOSHI SUB DIVISIONAL MAGISTRATE

Appearance:

1. Special Criminal Application No. 270 of 2002

MR ANIL S DAVE for Petitioner No. 1

MR KAMEN N SHUKLA for Petitioner No. 1

MR HH PATEL Ld. APP for Respondent No. 1-2

CORAM : MR.JUSTICE C.K.BUCH

Date of decision: 17/07/2002

ORAL JUDGEMENT

The petitioner has challenged the legality and validity of the order of externment dated 31.12.2001 passed by the Sub Divisional Magistrate, Mahuva and confirmed by the Appellate Authority i.e. State Government on 6.3.2002 by invoking the jurisdiction of

this court under Article 226 and 227 of the Constitution of India. The order of externment dated 31.12.2001 is at Annexure-B and the order dated 6.3.2002 of the Appellate Authority is at Annexure-D of this petition.

The notice to show cause under sec. 59(1) was served to the petitioner by the Sub Divisional Magistrate on 28.8.2001 alleging that he is a dangerous person and has been found involved in four different offence punishable under chapters-16 and 17 of IPC. It is alleged in the notice to show cause that the activities of the petitioner was threats to the peace and maintenance of public order and under the threat and distress as to of their safety, the witnesses may not turn up in the Court of law to depose in the cases registered against the petitioner as an accused. The notice to show cause was replied by the petitioner on 25.9.2001 and the conclusion of the inquiry the order of externment was passed.

Both the orders under challenge have been assailed on various grounds, however, Mr. Shukla has concentrated his argument mainly on one ground and has submitted that the order of externment passed by the authority is nothing but a mechanical passing of an order without application of mind and such an order cannot sustain and, therefore, the same requires to be quashed. It is rightly argued that if the order of externment is found illegal, the order of Appellate Authority would automatically go.

On facts, in para-17 of the reply to the show cause notice, the petitioner had tried to point out the authority that the allegations in all the four criminal cases lodged with the police station requires scrutiny. This is not a case wherein he could be externed. It is submitted that the case would not fall in the category under which the action contemplated under sec. 56 of the Bombay Police Act would be exercised.

It is submitted that the authority while issuing notice to show cause and especially at the time of passing of the order of externment should act with due care and diligence and order should be passed with proper application of mind in reference to the scheme of the Act. The externment is a harsh action and it touches the liberty of a person and his right/privilege to free movements in the entire nation. The order passed mechanically would restrict the such right and the movement both and, therefore, only the externing authority is supposed to consider all the relevant

material aspects. Unless the authority is able to reach to a conclusion that the presence of the petitioner would disturb the peace and tranquility of area and his presence by itself would be a threat to the witnesses who are to appear as witnesses in the criminal proceedings against him or any other such person, the powers under sec. 56 normally should not be exercised. Many other points like gravity of offence, number of offences registered, socio economic back ground of the victim side etc. are all other relevant aspects. The scheme of sec. 56 read with sec. 59 in Chapter-5 of the Bombay Police Act is based on the principle that it is desirable, in larger interest of society that the freedom of movement and residence of a comparatively fewer number of people should be restrained, so that the majority of the community may move and live in peace and harmony, and carry on their peaceful avocations untrammeled by any fear or threat of violence to their person or property. But the person who is to be externed shall have to be offer an opportunity to explain the case against the material allegation and the authority therefore is supposed to act meticulously. Plain reading of the order passed by the ld. Sub Divisional Magistrate does not deal with any of such aspects.

Placing reliance on the decision in the case of Dafer Rahman Zarar vs. State of Gujarat & Ors., reported in 1999(1) GLH p. 425, it is argued that the ratio of this decision would squarely applies to the facts of the present case. In the cited case, it was alleged that the externee Dafer Rahman Zarar was involved in the offence punishable under Chapters 16 and 17 of IPC and on scrutiny of facts, it was found by the Court that the offence allegedly committed by the externee were punishable under Chapter-16 of IPC only and not under chapter-17 of the IPC. The Court found that unwanted or irrelevant reference of chapter-17 made in the order indicates a vice of non application of mind. It would be proper to quote the relevant para-6 of the cited decision, where the Court has observed that:

"The order of the Externing Authority further suffers from the vice of non application of mind when he has mentioned that the petitioner has committed registered offences under Chapters-XVI and XVII of the IPC. Two C.R. Nos. 10/97 and 89/95 are under Sections 323, 504 and 506(2) of IPC besides 447 and 337. The offence under Sections 504 and 506(2) do not fall either under Chapter XVI and XVII of the IPC. Remaining offence falls only under Chapter XVI and not

under Chapter XVII of the IPC. Thus, it is mechanically mentioned in the order of the Externing Authority that the petitioner has committed offences punishable under Chapters XVI & XVII of the IPC which has further rendered it illegal and invalid."

As per the record of the present case, the present petitioner was found involved in four criminal cases, out of which, two offences were registered at 10.00a.m. and 10.30 a.m. on 19.1.2001 on account of some family disputes. The complainant of the second complaint, registered at 13.15 hours with Mahuva Police Station, is the mother of complainant of fist complaint. In the first complaint, the present petitioner has been named as accused along with other co-accused having committed the offence punishable under sec. 324, 323 etc. As per the second complaint, the very group of accused committed the offence punishable under sec. 323 etc. The offence punishable under sec. 504 and 506(2) IPC do not fall either under chapter-16 or 17 of IPC. The Authority has accepted this contention raised by the petitioner in the reply, however, it has been held that all other offences are the offence punishable under Chapter-16 & 17. While recording this findings, it seems that the authority has not even cared to see the provisions of both these chapters of IPC nor the status and inter-se relation between the accused side and the complainant side. It seems that ld.Sub Divisional Magistrate was determined to pass the order of externment, otherwise on facts also in the present case, there was no scope to exercise the powers under sec. 56 read with sec. 59 of the Bombay Police Act. This is a fit case according to this Court, wherein the authority could have withdrawn the show cause notice on receipt of the written explanation dated 25.9.2001.

Ld. APP Mr. HH Patel has placed reliance on two decisions in support of the orders under challenge. The first decision is in case of Abedin Rasul Bombaywala vs. Commissioner of Police, Surat & Anr., reported in 1986 GLH P. 986 where the Division Bench of this Court has evaluated the validity of the notice to show cause served to the externee and held that there was as such no vagueness in the notice and on facts, held that the case could not be said to be of non-application of mind and it would not vitiate the proceedings. There were 11 serious allegations against the externee which is in para-1 of the cited decision. The court feels that this cited decision is based on very different type of facts. The nature of the allegations made against the externee in

the cited decision are so serious and self contained, so the court held that there is no vagueness or the element of non-application. Law has to be applied in reference to factual matrix of each case.

The second decision, cited by Mr. Patel is in the case of Laxmansingh Vir Bahadursingh Gurkha vs. State of Gujarat & Ors., reported in 1989(1) GLH P. 581. In this decision, the Division Bench has held that it is well settled that it is not necessary to state specific instances in the notice to show cause and it should be held to be proved before the exeternment order can be passed. Following the decision of the Apex Court in the case of State of Gujarat vs. Mehbubkhan , reported in AIR 1968 SC 1468, the court held that it is sufficient if the notice under sec. 59 contains general nature of the material allegation and it is not necessary that the notice should disclose all material particulars and the allegation of vagueness in the notice was not accepted. Because chapter-5 of the Bombay Police Act deals with the special measures for maintenance of public order and the safety of the State. The person who is served with the notice of externment should be asked to put his explanation against the material allegation which might have been put in general nature.

The point argued by the ld.counsel for the petitioner is absolutely different points of law and has submitted that in view of the decision of this Court, the present order of externment is not sustainable. The present petitioner has not prayed that the charges levelled against him are false and the externing authority has failed in applying mind in examining the correctness as to the nature of the charges levelled against him. So,the cited decision in the case of Laxmansingh (supra) would not help the respondents.

Before parting with the order, it would be appropriate to mention that one of the co-accused was ordered to be externed by the same authority had preferred an appeal to the State Government and his appeal was partly allowed and the order of externment was modified and he was asked to furnish personal surety bond of Rs. 25,000/ and two sureties of the like amount. The present petitioner was not given the similar treatment on similar facts and evidence on record. But this event of fact is not relevant when the order is assailed totally on different grounds invoking the jurisdiction of this Court under Articles 226 and 227 of the Constitution of India.

In the result, this petition is allowed. The order of externment dated 31.12.2001 passed by the Sub Divisional Magistrate, Mahuva and confirmed by the State Government vide order dated 6.3.2002 are hereby quashed and set aside. Rule is made absolute. DS Permitted.

(C.K. BUCH, J.)

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